A Single Unified Supervisory Authority for Financial Services in Malta and beyond - some Legal and Regulatory Issues[350]

Dr. **David Fabri** LL.D.[351]

Preliminary

During this past decade, many countries have addressed the question of how their financial services sector should be regulated. The UK has seen the creation of the Financial Services Authority and the demise of the self-regulatory system formerly organized under the Financial Services Act of 1986. In the wake of the recent Parmalat and Fazio scandals, Italy toyed with the notion of creating a "Super-Consob" and the curtailing of some of Banca D'Italia's functions. In these past few years, single regulatory structures have been established in several countries in and outside the European Union. These have included Austria, Bahamas, Barbados, Belgium, Estonia, Germany, Hungary, Ireland, Japan, Mauritius, and the Canadian Provinces of Ontario and Quebec. Other countries or jurisdictions have been busy re-considering or reforming their regulatory arrangements.

This paper primarily seeks to trace the development of a single regulatory authority for financial services in Malta, recording a sequence of important decisions and events marking a process

[350] The original version of this paper had been completed for publication in this journal in August 2003. It had been loosely based on a talk, accompanied by a power-point presentation, on the subject "Setting up a single unified financial services authority – advantages and disadvantages, and developments in Malta and beyond", given on the 3 October 2001 to participants at the Malta-Commonwealth Third Country Training Programme (organized jointly by the Islands and Small States Institute at the Foundation for International Studies and the Commonwealth Secretariat). Regrettably, due to transitional editorial boards, the journal has not been published since then. Having been dusted, revised and updated, it now attempts to show the position as at July 2006. The paper reflects the author's personal views and does not represent any official policy.

[351] Senior Lecturer in the Commercial Law Department, University of Malta, mainly on financial services and consumer legislation, and Director for Legal and International Relations with the Malta Financial Services Authority.

launched in 1994 and only finalized in 2003. Upon completion of this project, Malta joined a then still relatively small number of jurisdictions where the supervision of the entire financial services sector was entrusted to one single agency. Indeed, the Malta Financial Services Authority[352] (MFSA) is now the single unified regulatory authority for the whole financial services sector in Malta. It exercises supervisory oversight in the three traditional areas of financial services activity, namely banking, insurance and securities.[353]

This brief paper does not tell the full story of how and why the original Malta International Business Authority[354] became the Malta Financial Services Centre (MFSC) and then, later, the MFSA. It is also the tale of how a smallish regulatory agency with an exclusively offshore mission found itself re-constituted and re-designed into a more substantial regulatory authority with consolidated supervisory responsibility for the entire domestic financial services sector. The Maltese experience offers an interesting case study within an international context that seems to be in perpetual flux.

This paper assumes agreement on the proposition that providers of financial services to the public should be properly supervised by specialized administrative agencies set up for that purpose. This shall allow it to focus attention on the administrative structures set up to undertake such supervision in Malta and in several other selected jurisdictions. Research shows that countries have devised different solutions as to how best to regulate their financial services industry. Some countries have established a single regulatory structure, whereas others, more numerous, continue to allocate different responsibilities to different agencies. Also interesting is

[352] Established by the Malta Financial Services Authority Act, Chapter 330 of the Laws of Malta.
[353] Securities business includes the financial markets, investment services and collective investments schemes.
[354] Established in 1989 under the Malta International Business Activities Act, the former Chapter 330 of the Laws of Malta.

the finding that the single regulator jurisdictions have actually adopted a variety of structures and models.

The point of departure for this discussion therefore is that countries are still allowed, indeed have, to make up their own minds as how best to organise their internal regulatory structures. This is still a matter to be decided by domestic national law. Neither the World Trade Organization (WTO) nor the older and more developed European Union (EU), both of which shall now be considered here, imposes or proposes any specific financial services administrative framework or regulatory model for their respective member states.

An introductory note on the international dimension

(a) **The World Trade Organization**[355]

Within the World Trade Organization framework, financial services regulation is governed by the General Agreement on Trade in Services (GATS).[356] The GATS does not prevent members from imposing authorization requirements provided these do not breach the country's obligations or commitments (especially on market access and national treatment). Article 2(a) of the GATS in fact states that:

" ...a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system."

[355] See generally Opening markets in Financial Services, WTO Publications, 1997; Dobson W. and Jacquet P., Financial Services Liberalization in the WTO, Institute for International Economics, 1998.

[356] Annex 1B to the Final Act establishing the WTO signed in Marrakesh in 1994, which came into force on 1 January 1995.

Accordingly, prudential measures are not considered as limitations on market access and national treatment, and need not be listed in a country's schedule of specific commitments.

While the WTO Agreement does not require this, most countries would in fact have some form of state authorization mechanism for all or some of their financial services providers. The huge economic, legal and cultural differences that divide its member states[357] makes it difficult to achieve agreement on a common framework for financial services regulation. The WTO itself could not go further in this field as it has no competence to impose any particular regulatory system. This difficulty also suggests that at this stage no ideal universal model for financial regulation capable of application to every country, irrespective of its size or circumstances, can be envisaged.

(b) **The European Union**

Neither the European Commission nor the various EU financial services Directives stipulate how a member state's regulatory structures should be designed.[358] They do however broadly require that a member state be in a position to fulfil its Treaty obligations and to transpose and properly implement the various directives. As a more integrated and cohesive grouping than the WTO,[359] the European Union issues various sets of norms that every member state must follow, particularly with the aim of promoting the internal, or single, market and the harmonization of regulation in various fields. In the financial services field, recent EU Directives explicitly require member states to set up effective supervisory agencies with sufficient competence and power to implement the relevant rules. The EU single passport concept, for instance, broadly requires member states to establish an effective home

[357] These include some of the richest and most developed countries and some of the poorest and least developed nations.
[358] See generally, Challenges to the Structure of Financial Supervision in the EU, Centre for European Policy Studies, (ed. Green D.), July 2000.
[359] See generally, Farrel M., EU and WTO Regulatory Frameworks: complementary or competition?, London European Research Centre, European Dossier Series, Kogan Page Limited, 1999.

supervisory body able to evaluate licence applications, to apply the fit and proper test and to supervise its licence-holders. The home supervisory authority needs to be capable of supervising the operations carried out by its licensees both in its own territory and in other EU member states. It is also obliged to exchange information and to collaborate with equivalent regulators from other member states.

Nevertheless, the EU neither imposes nor suggests any particular model or design for financial services supervision in its member states. Indeed, the members of the EU have adopted a variety of supervisory arrangements. If one considers the area of securities business supervision, no particular model is spelt out and the EU financial services Directives do not dictate how a member state's securities regulator should be organized, what it should do and what juridical status it should enjoy. These matters remain within the internal competence and discretion of the member states. The Directives require the member states to set up a supervisory body enjoying powers that are adequate to perform the obligations arising under the various Directives. The recent Market Abuse Directive now requires each member state to designate one national agency responsible for all the obligations arising under this Directive.[360] The designated agency shall have to be able to exercise a number of specified powers, including the power to require information, to make compliance visits and to take a series of other listed measures.[361] The nomination of a single agency was deemed essential to ensure close and rapid exchange of information and assistance in cross-border investigations between the security regulators of the member states. Where a member state has two (or more) securities regulators,[362] it will have to nominate one of them to exclusively assume all the Directive obligations.[363]

[360] Directive 2003 /6 /EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). See recital 36 and article 11. This Directive was transposed into Maltese legislation through the Prevention of Financial Markets Abuse Act 2005 (PFMA), Act no. IV of 2005.
[361] The MFSA is the competent authority for all purposes of the PFMA, in terms of article 2.
[362] This was the case in Malta between 1994 and 2003 with the MSE and the MFSC sharing the task of supervising the financial markets and the provision of investment services. Until recently, France too had fragmented supervisory structures in place in the securities field.

It is useful to quote recital 36 of this Directive on this point:

"*A variety of competent authorities in Member States, having different responsibilities, may create confusion among economic actors. A single competent authority should be designated in each Member State to assume at least final responsibility for supervising compliance with the provisions adopted pursuant to this Directive, as well as international collaboration.*"

Beyond this obligation, each member state is still allowed to develop the system of regulation it considers most effective and appropriate within the realities of its economic, institutional and legislative circumstances. This approach appears to be also in line with the principle of subsidiarity introduced by the Maastricht Treaty. Although the European Union has achieved a significant degree of harmonisation of rules, member states still have very different regulatory arrangements. Some have moved towards a single unified regulator, while others have studiously avoided that approach.

Supervisory agencies in the different member states exercise different roles and functions, enjoying dissimilar legal and political status and operational autonomy. One finds significant disparities in the method of the appointment of their governing council, the term of their appointment, the financing of the agency, the rights of levying fines and of issuing binding regulations, the way they are audited and by whom, and their reporting obligations.
Several EU accession countries still have a tripartite sharing of supervisory functions, more or less neatly divided into supervision of banking, insurance and securities business. These include

These were eventually merged in August 2003 with the establishment of the Autorite' des Marches Financier.

[363] A similar provision is now found in the MIFID – see article 48 paragraph 1. On the contrary, its predecessor, the ISD – Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, better known as the ISD, which is still in force but shall shortly be replaced – did not require a single designation but only required member states to "designate the competent authorities which are to carry out the duties provided for in this Directive. They shall inform the Commission thereof indicating any division of those duties." (Article 22).

Cyprus, the Czech Republic, Greece, Italy and Slovenia. Up till 2003, Poland still had four separate agencies, while Bulgaria at that stage remarkably had five separate supervisory bodies, which qualified it as one of the most fragmented regulatory structures in the world.[364] Since 2000, Hungary has had a single unified agency which consolidated the competence of three former regulatory agencies. Belgium has had a unified regulatory agency since I January 2004 when the Banking, Finance and Insurance Commission (CBFA)[365] was set up following the merger of the former Banking and Insurance Commission and the Insurance Supervisory Authority.

Denmark, Iceland, Norway and Sweden have all had an autonomous single unified regulatory authority for quite some time. Germany and Austria have these past few years replaced their former multiple regulator structures with a single unified regulatory agency combining the supervision of banking, insurance and securities business.

The Czech Republic and Slovakia are special cases. They have both recently consolidated the financial supervisory functions into a single regulatory structure. In each case, however, it is the national central bank that has been assigned the role. Slovakia passed legislation, the Financial Market Supervision Act, whereby the National Bank of Slovakia[366] became the single unified regulator for the entire sector in late 2005. The Czech Republic[367] implemented its single agency structure even more recently, in March 2006. They are the only two EU states which have supervision concentrated in their respective national central bank.

[364] Bulgaria has since re-shaped its regulatory structures in 2003 with the creation of the Bulgarian Financial Supervision Commission which merged three former bodies. The Commission supervises securities and insurance business. The Bulgarian National Bank has retained banking supervision.

[365] Commission Bancaire, Financiere et des Assurances.

[366] See www.nbs.sk

[367] See www.cnb.cz

(c) Some other International Aspects

Several countries have adopted or are moving towards a form of single unified regulatory structure. No identifiable common pattern is however apparent, and these countries have gone about the process in different ways and perhaps for different reasons. Most have set up a new organization separate and at arm's length from the national central bank. In a few countries, and exceptionally, the national central bank itself has been appointed the single unified authority for the entire financial services sector. This is the position in Singapore, The Gambia and now also Slovakia. Until recently, Mauritius too was moving in that direction, but following political and policy changes, the project has been curtailed. The Bank of Mauritius will be retaining its traditional banking supervision function, while a new Financial Services Commission was set up in 2001. This agency has been designed as a unitary financial regulator, with responsibility for all-non-banking financial activities, mainly insurance, securities and offshore companies.[368]

Most countries still assign bank supervision responsibilities to their national central banks. Some may assign to their central bank an additional supervisory responsibility, which means either insurance or securities business supervision.

A case in point is Switzerland which has two federal regulatory agencies, the Federal Banking Commission, which supervises banking and securities activities, and the Federal Office of Private Insurance. A major financial location, Switzerland seems to have recently succumbed to the charms of the single regulatory concept. The Financial Times reported on 19 April 2006 (*Swiss super-regulator begins to take shape)* that "*after almost a decade in the making*", a new agency to be known as Finma would shortly consolidate the Federal Banking Commission with the insurance regulator and the money-laundering office. Japan, another major financial location, has had a single Financial Services Authority since 2000.

[368] see www.bom.intnet.mm and www.fscmauritius.org

Many countries still retain what may be called the "classical" tripartite division of responsibilities. China, the Czech Republic and Italy, to take just three examples, still have three different regulators broadly mirroring the three traditional categories of financial services.

In broad terms, Italy distributes its regulatory competences between the Banca D'Italia for banking supervision, the Commissione Nazionale per le Societa` e la Borsa (CONSOB) for securities business supervision and the Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (ISVAP) for insurance supervision.[369]

France and the USA are two countries with a very specialized and independent securities commission, totally separate from and unrelated to the banking supervisory body. Clearly, federal jurisdictions, such as the USA and Canada, which have to deal with the constitutional division of responsibilities and jurisdiction between the central federal government and the individual states or provinces may make the discussion slightly more complicated. At the federal level, Canada does not have a single regulator system, whereas the provinces of Ontario and Quebec have in recent years established a single regulatory agency.

What this investigation therefore suggests is that it is not advisable to copy another country's model or to follow perceived fashionable trends. A model that may function coherently in one country may prove less effective in another, where the prevailing conditions are dissimilar. In devising a regulatory structure, one should carefully assess the size, nature, depth and objectives of the financial services sector under consideration, the state of development of the financial system and of the economy in general, local politics and public expectations, the efficiency of the administrative systems, the quality of the legislation and human resources as well as other

[369] As already remarked earlier the regulatory architecture in Italy has recently come under severe criticism and scrutiny following the Cirio, Parmalat and Fazio incidents. The Banca D'Italia's former leading role in competition in the banking sector has now been reduced whereas the CONSOB 's investigative powers have been strengthened.

national characteristics as the size of the country and of its population. In lesser-developed countries, it has often been found preferable to entrust the supervision of banking activity to the well-tried and respected national central bank, and not attempt to create novel untested administrative structures.

The idea or perception that a single unified regulator is an ideal arrangement for small jurisdictions is often repeated, but just as frequently challenged. Iceland, Estonia, Guernsey, Slovakia and Mauritius are just five of several relatively small jurisdictions which have, in their own peculiar way, implemented a single or unified regulatory structure.[370] On the other hand, the Financial Services Authority (FSA), the single regulator in the United Kingdom and the German BAFIN supervise a leading, substantial and well-developed financial sector. Size is therefore just one of a series of relevant factors, and is not, by itself, a conclusive factor. What may be appropriate for a big jurisdiction may be inappropriate for a smaller country, and vice versa. Supervisory arrangements which individual countries have put in place are usually the product of legal, political and historical events, and cannot be properly understood outside these contexts. A very brief reference to two very different jurisdictions which both adopted a single regulatory structure under legislation adopted in 2001 will serve as an introduction to the Maltese experience.

In the United Kingdom, the Financial Services and Markets Act 2001 and the Financial Services Authority can trace their origins to the well publicized inefficiencies and anomalies of the self-regulatory framework organized under the Financial Services Act of 1986 and to the increasing impact of EU Directives on the single passport in financial services. Another important factor was the election, in 1997, of a new Labour Government whose electoral platform included the radical reform of the UK regulatory framework and the termination of the reliance on self regulatory organizations.

[370] These models show substantial variances; but regrettably space does not permit a comprehensive comparison between the single regulatory models implemented in these small jurisdictions.

Estonia embraced the single regulator concept in 2002 following the passage of a 2001 law,[371] when a new agency, the Estonian Financial Supervision Authority, was created. This new agency is closely linked organizationally to the Estonian Central Bank on which it still largely relies for administrative and logistical support, including the sharing of the Bank's premises. To understand the reasons behind this particular arrangement, one may take into account Estonian political and administrative realities including the country's only fairly recent moves to a democratic status, market economy and de-centralisation of power.

The Particular case of Malta

In 1993, supervision over financial services operations was greatly fragmented and shared between four different entities. The Central Bank of Malta[372] supervised banking activities and in practice acted as an overseer of the entire local financial system. The Malta Stock Exchange[373] licensed and supervised stockbrokers, and authorized listings on the single Exchange which it both operated and monitored. The Ministry of Finance still supervised the domestic insurance market in terms of the Insurance Business Act of 1981. The Malta International Business Authority (MIBA)[374] was the sole regulator of the entire offshore (financial and corporate) sector.[375]

In effect, the MIBA was the single specialized unified regulatory authority for the offshore business sector. This role extended to ordinary trading and holding companies, as well as to banks, insurance operations and securities business that could be set up under the special offshore legislation. The creation of the MIBA also meant that for some years Malta had two separate regulators

[371] The Financial Supervision Authority Act which entered into force on 1 June 2001.
[372] Established under the Central Bank of Malta Act 1967.
[373] Set up by the Malta Stock Exchange Act 1990.
[374] Established by the Malta International Business Activities Act.
[375] Actually, very few of the companies authorized by the MFSA actually carried out any financial services business. Most offshore companies were mostly small holding and trading companies. No offshore investment services operations were ever licensed and only five offshore banking licenses were issued. The legal framework for offshore business activities lapsed in 2004.

for banking, for insurance, and for securities business. This duplication led to some anomalies and raised concerns not only locally but also in the international sphere.

Originally announced to Parliament by the Minister of Finance in November 2003 in the budget speech for 1994, the single regulator objective was implemented in stages. Throughout 1994, the first legislative steps were adopted by Parliament. These included substantial amendments to existing legislation and the introduction of several important new laws, such as new laws on insider dealing, money-laundering, banking and investment services. 1994 was a crucial year and a turning point in financial services regulation in Malta: among other things, it launched and laid the foundations for the establishment of a single regulatory authority for financial services.

In 1994, four years after submitting its application for European Union membership, government decided it was time to bring some order to financial services legislation and supervision and to consolidate and upgrade it. It also decided to terminate the local offshore business activity. In this context, it may have been surprising that a policy decision was also to construct the new all-embracing regulatory system around the former offshore authority. Government decided against disbanding the young offshore authority,[376] and instead developed it into a more comprehensive administrative authority with even wider functions, responsibilities and powers. This twist in favour in MIBA's fortune was ironic in the light of Government's decision to abandon offshore. Offshore business was to be phased out but MIBA was to be retained and considerably strengthened. New offshore registrations were only allowed up till the end of December 1996 and all offshore activities had to cease by September 2004. Offshore business was to be phased out.[377]

[376] Which had started operations only five years previously.
[377] Offshore Business registration ended in December 1996 and the sector drew to a final conclusion in September 2003. See generally article by Fabri D. and Baldacchino G. in Hampton.

As part of the 1994 reforms, MIBA was re-constituted and re-named as the Malta Financial Services Centre (MFSC) and was assigned responsible for the supervision over insurance[378] and investment services activities.[379] The supervision of banks and other financial operators known collectively as financial institutions[380] remained, for the time being, entrusted to the CBM, and was only transferred a few years later.[381]

One of the policy cornerstones underlying the extensive 1994 reforms was the official identification of the MIBA, now newly-styled as the MFSC, as the future single unified regulator for the entire sector of financial services as an objective for medium term objective. This objective was not achieved overnight. At the end of 1994, despite the extensive legislative changes undertaken during that year, three separate regulators were still in operation: the Central Bank of Malta, the Malta Stock Exchange and the MFSC. It took almost an entire decade to complete the project for establishing the single unified regulator. Various factors explain why it took Malta several years to consolidate financial services regulation in one single body.[382] At a political level, consensus on the future role of the CBM was lacking and like Malta's EU membership application, the move towards a single agency was suspended for a few years during the short-lived Labour government 1996-8, and then re-activated in late 1998 following a change of government.

[378]Responsibility for supervision of the local insurance market had been transferred from the Ministry of Finance to the MFSA in December 1994 by means of a "Delegation of Authority", published as Government Notice 752 of 1994 on the 25th November 2004. The Minister of Finance delegated most of his powers under the 1981 Act to the MFSC. This delegation came into force on the 1 December 2004.

[379] Under the new Investment Services Act 1994.

[380] Under a new Act called the Financial Institutions Act which regulated several unconnected non-banking financial activities including foreign exchange dealing, lending, financial leasing and forfeiting.

[381] See below.

[382] Hardly, any local literature on this subject exists and this paper does not purport to fill the entire gap.

Indeed, following the extensive legislative reforms of 1994, little or no further progress was then achieved for a number of years. The change of government that followed the 1996 General Elections,[383] and the political differences that existed on the issue, curtailed further developments in this area. Then, late in 1998, following fresh General Elections, the Minister of Finance in the new Nationalist Party government, the same Minister who had originally launched the project in 1994, re-confirmed his government's official policy to pursue the single regulatory agency project to completion.

Mr J Dalli announced his plan to re-activate the single regulatory agency project in November 1998 during his Budget Speech for 1999. A year later, in a speech given to the second Asset Management Conference, in October 1999, he re-iterated his plan:

"In the very near future, the regulation and supervision of banking and credit institutions will be moved to the Malta Financial Services Centre." [384]

The exercise was executed in a sequence of steps achieving completion between 2002 and early 2003, with the transfer of bank supervision and the assignment of the roles of Listing Authority with the duty to administer the Financial Markets Act to the

[383] When the Labour Party government replaced the then Nationalist Party in government.

[384] The Times report of the 22 October 1999 ("Central Bank governor against transfer of regulatory role") recorded the negative (and surprised) reaction of the then out-going Governor of the Central Bank of Malta):
"Expressing surprise at the decision, he said that in small countries the regulatory aspect tended to be in the hands of central banks, which had the financial and human resources to carry out the role effectively."
The Governor was also quoted as having said:
"I am not aware of any preparations made by government in this respect. So when Mr Dalli is saying that this is something which is expected to take place imminently, I don't know what he is referring to...... It's simple to make such a pronouncement but it's not that easy to put into effect because specialized human resources are not that available in the country."
This particular problem was eventually resolved when the larger part of the bank supervisors at the CBM accepted new employment with the MFSA. This ensured continuity of supervision and the retention of information and experience. This issue also shows that the development of a single regulator may involve human resources and management problems.

MFSA.[385] Under that Act, the MFSA started overseeing the operations of the MSE, whose former regulatory role had ceased and now operating as an authorized investment exchange in terms of the re-styled Financial Markets Act.[386]

1994 saw the adoption of a brand new law on banking. Initially, the CBM was retained as "competent authority", but it was government's declared intention to eventually also transfer banking supervision from the CBM to the Centre.[387] In the next seven years between 1995 - 2001, nothing of much significance happened and consequently three separate financial services regulators, namely the CBM, the MFSC and the MSE continued to operate simultaneously. Indeed, the proposal to remove banking supervision from the Central Bank became an issue of political disagreement, with the Opposition suggesting that the CBM merited being kept as banking supervisor, indeed as the single financial regulatory agency, in view of its longer experience in financial supervision. Eventually, banking supervision passed to the MFSA in 2002.[388]

The concept of "competent authority" was central to the project of establishing a single regulator for financial services in Malta. Rather than expressly mentioning the MFSC, and later the MFSA, each of the laws provided for the appointment by the Minister of Finance, by means of a government notice in the official gazette, of a "competent authority" to administer the law and ensure compliance with its provisions. Incredibly, the MFSA still administers the insurance, investment services and banking laws under this extremely fragile administrative arrangement, which in

[385] Which was the new name given to the fonner Malta Stock Exchange Act.
[386] Legal Notices 1 and 2 of 2003 issued in tenns of the FMA conferred on the MFSA the roles of Listing Authority and of Competent Authority, respectively; both effective from the 3 January 2003.
[387] This policy was stated in 1994, anticipating by a number of years the steps taken in the UK by the new Blair administration which ended the Bank of England's role as banking regulator.
[388] Legal Notice 325 of 2001, issued under the Banking Act, provided for the appointment of the MFSA as competent authority for the purposes of that Act with effect from 1 January 2002.

theory means that its supervisory role in the sector may be terminated or changed by the mere publication of a ministerial order appointing some other body to replace it.[389] This had been devised as a convenient mechanism for the transition from one regulatory regime to another, for the eventual substitution of the "competent authority" in the sectors supervised by the CBM. Today, so many years later, the legal position remains the same. The same mechanism is still in operation. It is not only archaic but also untenable seeing that international obligations require the MFSA to have unambiguous competence, powers and autonomy of operations.[390]

Even the very recent Securitization Act[391] is due to be administered by a "*competent authority*" for which post the MFSA has been clearly already earmarked.[392]

Since 1 July 1997, Malta's foremost financial services regulator started housing and incorporated the Registry of Companies. The office of the Registrar was largely modelled on the UK original and was founded in 1965 when the Commercial Partnerships Ordinance was passed. It was set up as a government department. In that month, the MFSC was assigned responsibility to administer the responsibilities of the Registrar under the new Companies Act, which in 1995 completely overhauled the Ordinance.[393] Most single regulatory agencies do not have a similar responsibility for companies.

[389] See article 2A of the Investment Services Act, and article 3 of the Banking Act, respectively Chapters 370 and 371 of the Laws of Malta
[390] In the writer's view, this mechanism has lost its best by date and should now be scrapped and consigned to history. It gives an impression of lack of confidence as to whether the new regulatory structures revised and reshaped since 1994 are certain and definite or merely a temporary experiment of sorts.
[391] Published in April 2006 as Act V of 2006.
[392] This results from the Parliamentary debates on the relative Bill.
[393] The Companies Act 1995 (Chapter 386 of the Laws of Malta) came into force on 1 January 2006, replacing the Commercial Partnerships Ordinance 1962 (Chapter 168 of the Laws of Malta).

Consolidated Regulatory Structures in other Sectors in Malta

It would be a mistake to assume that the concept of a single regulatory or administrative agency is exclusive to financial services. The question may arise in any area of business, especially when the sector has customarily been regulated on the strength of laws and structures developed on a piecemeal basis. The Malta Standards Authority now established under a separate law of 2000[394] merged all the functions formerly exercised separately by the Malta Board of Standards, the Food Standards Board and the Inspector of Weights and Measures, under different legislation dating from the sixties and even earlier.[395]

The Consumer Affairs Act of 1994,[396] as amended in 2000, was another deliberate attempt to place consumer protection under one oversight agency. The Director for Consumer Affairs now acts as the single focal point for monitoring such diverse subjects as the regulation of product safety and liability, misleading and comparative advertising, guarantees in consumer sales, consumer credit and distance selling. This approach achieved better coherence and cohesion and has recently been developed further by the administrative (but not statutory) merger of the functions of the Director for Consumer Affairs and the Director for Fair Competition into one single unit. These measures were intended to promote better synergy in the working of competition and consumer legislation.

A similar process has been carried out in the tourism sector. Piecemeal regulation of the sector had, since the sixties, led to the adoption of a number of different laws and a variety of different regulatory bodies. These authorities were assigned responsibilities covering various tourism-related operators and activities, such as travel agents, tour operators, hotels and restaurants, travel guides and beach-cleaning. Recently, government took the necessary steps to set up a separate new authority to consolidate all these

[394] The Malta Standards Authority Act, Chapter 419 of the Laws of Malta.
[395] The Weights and Measures Ordinance was adopted in 1910.
[396] Chapter 378 of the Laws of Malta.

various functions and to present to operators and other interested parties one single point of reference and one single authorisation agency for all tourism-related services. This consolidation exercise was also extended to the actual laws themselves, now conveniently replaced by one single consolidated legislation.[397] The Malta Tourism Authority established by the Malta Travel and Tourism Services Act 1999[398] has combined the functions formerly carried out by such disparate bodies as the Ministry of Tourism, the Hotels and Catering Establishments Board set up in the mid-sixties, and the National Tourism Organization (NTOM) formed in the seventies.[399]

Regrettably, there are indications that the process of change appears to have unduly favoured the interests of operators at the expense of consumer rights. What is peculiar here is the rather obtrusive participation of the private sector in the very heart of the governing Board of the Authority and executive structures. This participation is imbedded in the legislation itself. From strictly regulatory and consumer perspectives, it is arguable that the benefits of consolidation and streamlining in this case may have been outweighed by the increased influence that industry now exerts on the decisions and policies of the new tourism authority.[400]

[397] This is not the case with financial services laws which continue to regulate the different sectors separately.
[398] Chapter 409 of the Laws of Malta.
[399] See article 53 of the 1999 Act. The Act had been preceded by a White Paper published in 1997 with the title: White Paper proposing the setting up of a Malta Tourism Authority with powers to regulate tourism services and operations and for the promotion pf Tourism to Malta under the Malta Tourism Services Act 1997. The Act as eventually re-named and adopted in 1999 broadly consolidated and replaced five different pieces of legislation adopted since the mid-sixties, namely the Tourist Guide Services Act 1995 (Chapter 190 of the Laws of Malta), the Hotel and Catering Establishments Act 1967 (Chapter 197), the Guest Houses and Holiday Furnished Premises Act 1975 (Chapter 240), the Travel Agencies and Hotel Services Act 1976 (Chapter 264), and the National Tourism Organization Act 1984 (Chapter 310). On the strength of this Act, the MTA became the sole licensing body for tourism-related activities, from travel agents and tour operators to hotels, and tourist guides and excursion operators.
[400] This view recently found support in a landmark decision by the Commission for Fair Trading which found that the composition of the MTA was unsound as it breached the laws and principles of fair competition. See Bargain Holidays Limited et vs. Malta Tourism Authority decided on 17 October 2005 (Complaint 1/2004).

Another recent consolidation exercise was the setting up of a new statutory corporation under the name of Malta Enterprise in 2003.[401] This new agency seeks to promote Malta as a suitable location for inward investment and assists in the setting up of enterprises. It merged the functions and roles of three former specialized bodies, namely the Malta Development Corporation (MDC), the Institute for the Promotion of Small Enterprise Limited (IPSE) and Malta External Trade Company Limited (METCO). During the Parliamentary debate on the Bill, the government side went to considerable lengths to emphasize the benefits of streamlining of procedures, better efficiency and coherence and economies of scale that should result from this development.

A single regulator – a few of the features, concerns, perceived advantages and disadvantages

The legal form that a regulatory structure adopts defines its ability to act autonomously and its credibility as an effective force in society. There can be no doubt that a single regulatory body is a potentially powerful entity. In order to be effective in its role, it must achieve respectability, securing the respect and confidence of operators, the public as well as of other authorities, local and foreign. A single regulator needs to have the confidence and strength to resist unwarranted pressure and lobbying from political and business sources. Appropriate measures guaranteeing fairness, transparency and accountability should therefore be in place. It should also be seen to be using its considerable powers fairly and judiciously. The level of transparency, accountability and independence varies and each country needs to establish its own desirable and workable levels in tune with its political development and democratic evolution, as well as with consumer and public perceptions and expectations. Clearly, however, some systems are better structured and resourced to guarantee autonomy, transparency and fairness, than others. The greater the powers assigned to a regulatory agency, the stronger should be the

[401] The Malta Enterprise Corporation Act 2003, Chapter 463 of the Laws of Malta. See especially Parts V and VI.

institutional safeguards in favour of fair dealing, transparency and accountability.

More empirical studies would be required to assess whether a single unified regulatory structure is invariably more efficient and effective than a multiple agency structure. The disadvantages of having multiple regulators operating within one jurisdiction may include regulator-shopping, inefficient procedures, bureaucracy, higher costs, uncertain regulatory boundaries, overlaps and gaps, a potential for costly rivalry and misunderstandings, lack of accountability and consumer confusion. A multi-agency situation would necessitate the adoption of laws which describe fine and often artificial distinctions between various financial services and products, an exercise often motivated primarily by jurisdictional-territorial concerns. These laws would also likely attempt to resolve the allocation and determination of supervisory responsibility for hybrid products, a phenomenon which is on the increase.

The consolidation of supervisory duties within one agency should offer a number of benefits. Since regulation is always expensive to carry out and is never cost-neutral, the possible gains from economies of scale, particularly in smaller countries cannot be ignored. For a multi-service firm operating in more than one field of financial services, the single authority should secure certain advantages, such as lower fees and compliance costs, better streamlined and consistent procedures and expectations, reduction of paper-work, standardised application forms and returns, and generally greater consistency and harmonisation of standards across the industry. Additionally, where supervisory skills are scarce, the case for consolidating them in a single authority becomes stronger, particularly in smaller countries.

A single regulator should at the very least guarantee that operators, consumers of financial services and other interested parties would have only one very convenient single point of reference. The risk of operators and consumers being shunted from one agency to another would no longer arise. This advantage would also benefit other national authorities such as the competition authorities, as well as foreign authorities and international organisations which would prefer to have dealings with a single organization. A single supervisory agency removes any doubts as to where responsibility lies and excludes the possibility of passing the buck.

On the other side, one has to balance these factors against the potential disadvantages. A single unified regulator is a potentially very powerful entity. Accordingly, the legal system would need to introduce sufficient counter-weight safeguards to ensure administrative correctness, adequate judicial redress and accountability and reporting obligations. In some cases, regulators are appointed by Parliament and have been made directly answerable to it. Adequate safeguards against administrative abuse and political interference would need to be introduced. Critics of the single regulatory structure might also point out that:

(a) It might prove easier for lobbying groups and other interests to influence one entity than say three different bodies;

(b) A single regulator might simply convert formerly external divisions into its internal structure by creating units or departments dealing separately and exclusively with banking, insurance and securities business (the so-called "silo" effect);

(c) The establishment of a single regulator excludes potentially healthy competition between regulators to the detriment of consumers; and

(d) It might foster unrealistic expectations from consumers (and possibly also operators) who may expect too much from the unified single regulator.

Additionally, some may prefer smaller supervisory agencies which are more focussed, more specialised and have more specific objectives, on the assumption that, despite the increasing concentration, the traditional distinctions between the different areas of financial services will still broadly exist for the foreseeable future.

Whatever the case may be, the setting up of a single unified regulator needs to be supported by financial services legislation of a high quality; laws that do not create unrealistic distinctions between financial services and which are sufficiently flexible to allow periodic updating and efficient response to the ever-changing business environment. The laws should ensure firm and resolute regulation of financial firms, high levels of consumer protection, fair competition, as well as the punishment of bad and fraudulent operators. Equally important, the laws should impose standards of fairness, accountability and transparency on the supervisory agency itself.

No administrative structure can by itself guarantee good and effective regulation. Whatever administrative arrangements a country chooses to adopt, the two important elements of quality staff and quality legislation remain basic ingredients for effective regulation. Where established, a single regulator should be able to retain and draw on the skills and knowledge formerly developed and housed in the various regulators. An advantage of the single supervisory entity is to concentrate expertise deriving from different field of competence sharing experiences, techniques and knowledge. Supervisory personnel have to be sufficiently well remunerated and motivated in order to be able to match the expertise of the private sector. If these foundations are securely in place, a regulatory agency can start to achieve the credibility it shall require to operate efficiently and fairly.

The question whether a single regulatory system is more efficient than a multi-agency structure cannot be answered in abstract terms. One would have to first draw up the correct criteria and parameters for establishing what an efficient and effective regulatory authority means. Any claim that a particular supervisory arrangement is better than another is spurious in the absence of adequate objective empirical evidence, which regrettably is not readily available.[402] Each country establishes the system best suited to its circumstances.

Conclusion

The setting up of a single unified authority is never an end in itself, but is a means of achieving a higher objective. In the final analysis, an administrative agency is just a mechanism that can only be as good as the quality, commitment, reliability and expertise of its personnel and the quality of the laws it has to administer. The true objective must be to devise an effective, coherent, credible and efficient regulatory agency that could provide the best guarantees to operators, consumers and the general public.

A primary concern of this paper was to avoid any suggestion that having a single unified regulator or administrative agency is some miraculous solution to all the problems in financial services and other business sectors. It is not and cannot be. Sometimes, expectations from single regulators appear unduly optimistic, giving rise to what has frequently been termed "*moral hazard*". Furthermore, unless properly planned and managed, the transition from a fragmented system to the establishment of a single regulatory agency may prove a disruptive and wasteful exercise, and ironically risk becoming itself a serious problem for the sector.

We have seen that Malta was certainly not unique or the first to undertake the single regulatory project. Several other countries, both in Europe and elsewhere, had implemented or were considering this regulatory framework. What is remarkable is that even in the various jurisdictions which have adopted it, the single agency structure has taken different shapes. Indeed, one finds difficulty in pointing out two jurisdictions with perfectly identical single agency structures. The reason may be that no standard *off the shelf* or *one-size-fits-all* model exists, whether within the strict

[402] Most data is usually furnished by the regulatory agencies themselves.

single regulator framework or outside it. Additionally, the concept is understood differently in different countries, revealing an unsuspected flexibility and elasticity in the concept and in its various applications.

The MFSA may be considered a rare breed among single regulators. Not quite a new entity, it is the legal successor to two former regulatory structures, whose roles it has continued and developed. This project was finally sealed by the important 2002 amendments to what was then the MFSC Act (now the MFSA Act). This Authority has in stages taken over the supervisory functions originally (and traditionally) vested in government or in other domestic regulatory agencies, including the Minister of Finance and the Registry of Companies. It would appear that the MFSA is the only public agency which has graduated from a small and exclusively offshore regulator into a comprehensive integrated financial services supervisor. In this respect, the Maltese experience may indeed be unique.

Some abbreviations used in this paper:

MIBA - Malta International Business Authority
MFSC - Malta International Financial Centre
MFSA - Malta Financial Services Authority
CBM - Central Bank of Malta
MSE - Malta Stock Exchange
WTO World Trade Organization
EU - European Union

Selective Sources and Materials

Local legislation

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Malta Financial Services Authority Act 1988
Financial Markets Act 1990
(*formerly the Malta Stock Exchange Act 1990*)

Investment Services Act 1994
Banking Act 1994
Companies Act 1995
Insurance Business Act 1998
Prevention of Financial Markets Abuse Act 2005

Consumer Affairs Act 1994
Malta Travel and Tourism Services Act 1999
Malta Standards Authority Act 2000
Malta Enterprise Corporation Act 2003

Foreign legislation

Financial Services and Markets Act 2000 (UK)
Financial Supervisory Authority Act 2001 (Estonia)
The Central Bank of Ireland and Financial Services Authority Act 2002
The Act on Supervision over the Financial Market 2004 (Slovakia)

EC Directives

Directive 2003/6/EC of the European Parliament and of the Council on Insider Dealing and Market Manipulation (The Market Abuse Directive)

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www.isvap.it,
www.banque-france.fr,
www.amf-france.fr,
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Other:
www.fsa.go.ip (Japan),
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David Fabri
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